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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 In the Matter of:

Supreme Court No. R-18-_____

12 **PETITION TO AMEND RULE**
13 **15.3(a) OF THE RULES OF**
14 **CRIMINAL PROCEDURE**

PETITION OF
THE ARIZONA PROSECUTING
ATTORNEYS' ADVISORY
COUNCIL

(expedited consideration requested)

15 Pursuant to Rule 28 of the Arizona Supreme Court, the Arizona Prosecuting
16 Attorneys' Advisory Council ("APAAC") respectfully submits this Petition to
17 Amend Rule 15.3(a) of the Rules of Criminal Procedure to correct an unforeseen
18 and unintended consequence of the restyling efforts in Petition R-17-0002 (proposed
19 amendments to Arizona Rules of Criminal Procedure), adopted effective January 1,
20 2018. The amended proposed rule change is set forth in Appendix A.

21 **I. INTRODUCTION AND BACKGROUND**

22 Supreme Court Administrative Order No. 2015-123 created a Task Force on
23 the Arizona Rules of Criminal Procedure to review the Arizona Rules of Criminal
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1 Procedure and “identify possible changes to conform to modern usage and to clarify
2 and simplify language.” After working for nearly a year on that mission, the Task
3 Force proposed amendments to the Rules of Criminal Procedure (Petition R-17-
4 0002) which revised existing language, added new definitions, restyled and
5 reorganized the rules, and made substantive changes to promote clarity.
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7 In its original Petition (filed January 8, 2017), the Task Force did not propose
8 amendments to Rule 15.3(a). However, in its Supplemental Petition (filed April 25,
9 2017), in response to an apparent comment suggestion from the Arizona Voice for
10 Crime Victims (“AVCV”), the Task Force proposed amending Rule 15.3(a) by
11 replacing the phrase “those excluded by Rule 39(b)” with “victim.” Supplemental
12 Petition, p. 19. In its final reply pleading (filed July 7, 2017), the Task Force was
13 clear that this change was stylistic only and *not* intended to be substantive:
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16 **Rule 15.3. Depositions**

17 The Task Force proposes various stylistic changes to this rule, but no
18 substantive changes are intended. One of the stylistic changes is to
19 replace “those excluded by Rule 39(b)” with “victim.”

20 Petitioner’s Reply, Reply Appendix B (filed 7/7/2017). The amendments were
21 adopted by the Supreme Court on 08/31/2017, effective January 1, 2018.
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23 **II. DISCUSSION OF PROPOSED AMENDMENT**

24 This petition proposes to revert the restyled language in Rule 15.3(a) back to
25 its original phrase of “those excluded by Rule 39(b).” While the change was

1 intended to be merely stylistic and may have been proposed to eliminate verbiage, it
2 has had an unforeseen negative substantive effect on prosecution. Because of the
3 change in wording, prosecutors across the state are being deprived of their ability to
4 seek the deposition of crime victims, who are otherwise unavailable to testify at trial,
5 to be used as evidence in trial. As a result, prosecutors have been forced to dismiss
6 cases. This creates an unjust windfall to defendants while penalizing the State in its
7 responsibility to prosecute criminal offenses and seek justice.
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10 Rule 39(b)(12)¹ gives a crime victim the right “to refuse an interview,
11 deposition, or other discovery request by the defendant, the defendant’s attorney, or
12 other person acting on the defendant’s behalf[.]” Prosecutors, in contrast to
13 defendants or their agents, are not prohibited by this rule from deposing a victim
14 when, due to illness, planned travel, being a foreign national, or lack of cooperation,
15 there is a showing of substantial likelihood the victim would be unavailable for trial.
16 Prosecutors in Mohave County and Pima County have reported to APAAC that after
17 the wording of Rule 15.3(a) was changed by the recent amendments, trial courts
18 have read the new rule as prohibiting both the defense *and* prosecutors from
19 deposing the victim and have denied the State’s request for depositions in situations
20 where it was previously available.
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¹ Formerly Rule 39(b)(11) before the recent amendments.

1 In a case currently pending in Mohave County, the State sought a deposition
2 of a non-cooperating victim in a domestic violence matter where a gun was
3 discharged inside a residence, threatening its occupants. The State's request to
4 depose the victim, who had refused to appear at a scheduled court hearing, was
5 denied by the trial court because of the new rule. Mohave County prosecutors report
6 other instances where the deposition of a victim was necessary. In one, a homebound
7 person with severe health issues was the victim of, and only witness to, a home
8 invasion but was physically unable to come to court. In another, the victim was so
9 severely burned during the crime that even a year after the incident the victim was
10 not physically capable of attending trial. It is reported that Mohave County trial
11 courts have relayed to prosecutors that no depositions of a victim will be allowed on
12 the State's motions due to the Rule 15.3(a) changes.

16 Likewise, Pima County reports that they no longer obtain deposition orders
17 for crime victims due to the rule change. In one reported case, a victim had cancer
18 and the prognosis was that the victim would pass before the trial date. In another,
19 the victim was a citizen of Mexico and would not be in the U.S. at the time of trial.
20 Without the ability to depose these victims, prosecutors have been forced to dismiss
21 criminal cases.

24 These examples illustrate that the stylistic revision to Rule 15.3(a) has a very
25 real and substantive impact on prosecution, which APAAC believes was unforeseen

1 and unintended by the Task Force. The AVCV Comment to R-17-0002, which
2 prompted the revision, contained no discussion on Rule 15.3(a) before it submitted
3 the proposed revision. In its Petition, the Task Force did not identify Rule 15.3(a)
4 as one of the rules intended as a substantive change. In fact, as shown above, it was
5 specifically noted to *not* be a substantive change. Reply Appendix B, Petitioner's
6 Reply (7/7/2017). The unforeseen and unintended consequence of the change in
7 wording to Rule 15.3(a) has had a negative impact on criminal prosecution across
8 the state and directly impacts the interests of justice.

11 **III. PRELIMINARY COMMENTS**

12 This petition has not been circulated for comments.

14 **IV. REQUEST FOR EXPEDITED CONSIDERATION**

15 Supreme Court Rule 28(G) provides for expedited consideration of a rule
16 change petition when an urgent matter is presented and there are compelling reasons
17 why the annual rule processing cycle is inadequate. In this matter, criminal
18 prosecutions are currently being dismissed due to the State's inability to memorialize
19 the testimony of crime victims when those victims are unavailable for trial. To wait
20 for another year or more for the next rule processing cycle to consider this petition
21 could result in potentially hundreds of criminal cases being dismissed across the
22 state. APAAC accordingly requests expedited consideration and adoption of the
23 proposed rule change with a formal comment period to follow as permitted by the
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1 rule.

2 Wherefore, petitioner respectfully requests that the Court amend Rule 15.3(a),
3 Arizona Rules of Criminal Procedures, as proposed in Appendix A.
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6 RESPECTFULLY SUBMITTED this 18th day of October, 2018.

7 By: Elizabeth Ortiz
8 Elizabeth Ortiz, #012838
9 Executive Director
10 Arizona Prosecuting Attorneys'
Advisory Council

11 Electronic copy filed with the
12 Clerk of the Arizona Supreme Court
13 this 18th day of October, 2018.

14 by: Kiana Cooney

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3 **APPENDIX A**
4

5 (language to be removed is shown in ~~striketrough~~, new language is underlined)
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7 **Arizona Rules of Criminal Procedure**

8 **Rule 15.3. Depositions**

9 **(a) Availability.** A party or a witness may file a motion requesting the court to
10 order the examination of any person, except the defendant and ~~a victim~~ those
11 excluded by Rule 39(b), by oral deposition under the following circumstances:

12 (1) a party shows that the person's testimony is material to the case and that
13 there is substantial likelihood that the person will not be available at trial; or

14 (2) a party shows that the person's testimony is material to the case or
15 necessary to adequately prepare a defense or investigate the offense, that the
16 person was not a witness at the preliminary hearing or at the probable cause
17 phase of the juvenile transfer hearing, and that the person will not cooperate
18 in granting a personal interview; or

19 (3) a witness is incarcerated for failing to give satisfactory security that the
20 witness will appear and testify as a trial or hearing.
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